Supreme Court, U. S.
FILED
DEC 5 1975

No. 74-1371

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES D. MCCORKLE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willful failure to file income tax returns for the years 1965, 1966 and 1967, in violation of 26 U.S.C. 7203. He was sentenced to three years in prison and fined $10,000.

Petitioner was a court reporter during the years in question. He stipulated that he received gross income of $76,840.87 in 1965; $106,894.06 in 1966; and $121,586.17 in 1967, and did not dispute the fact that he filed no tax returns for those years. Initially, a divided panel of the court of appeals reversed petitioner's conviction on the grounds that he had been improperly restricted in the cross-examination of two Treasury agents and that the trial court's instruction on willfulness failed to advise the jury that it must find that petitioner intended to defraud the government before it could convict (Pet. App. A 1-9). However, on rehearing *en banc*, the court of appeals unanimously affirmed the conviction (Pet. App. B 10-24).

The only question presented to the jury concerned petitioner's willfulness. On that issue the trial judge charged the jury, *inter alia*, as follows (Pet. App. B 12):

> The failure to act is willfully done if done voluntarily and purposefully and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this case is the deliberate intention not to file returns, which the defendant knew he was required to file at the time that he was required to file them.
>
> The law does require proof of specific intent before the defendant can be convicted. Now, "specific intent" means more than general intent to commit the act; to establish specific intent the Government must prove, beyond a reasonable doubt, that Charles McCorkle knowingly did an act which the law forbids, purposefully intending to violate the law and knowing that such act would violate the law. Such intent may be determined by you from all of the evidence which has been submitted in this case.

1. Petitioner urges (Pet. 7-9) that the decision approving the above-quoted instruction is in conflict with *United States* v. *Bishop*, 412 U.S. 346; *United States* v. *Murdock*, 290 U.S. 389; and *United States* v. *Pohlman*, 510 F.2d 414 (C.A. 8), (Pet. App. D 26-34).[1] None of these cases, however, casts doubt upon the propriety of the trial

[1]Petitioner also contends (Pet. 8) that several recent Ninth Circuit decisions erroneously hold that a defendant may be found guilty of willful failure to file an income tax return if he merely acted knowingly or voluntarily. This is not correct. In *United States* v. *Klee*, 494 F.2d 394, 395 n. 1 (C.A. 9), certiorari denied, 419 U.S. 835, the court held that the trial judge was not required to instruct the jury that the government must prove "an intent to defraud the government, or to conceal from the government facts relevant to a determination of the accused's tax liability" (494 F.2d at 395). In *United States* v. *Hawk*, 497 F.2d 365, 366-367 n. 2, 369 (C.A. 9), certiorari denied, 419 U.S. 838, the court concluded that the instructions were not fatally defective for failure to advise the jury that it must find the taxpayer had an "evil motive" in failing to file. Accord: *Cooley* v. *United States*, 501 F.3d 1249, 1253 n. 4 (C.A. 9), certiorari denied, 419 U.S. 1123.

Contrary to petitioner's argument, these cases do not hold that a jury may convict simply on a finding that the defendant acted knowingly or voluntarily. In all of these cases, the trial judge instructed the jury, consistent with the requirement of *United States* v. *Bishop*, *supra*, 412 U.S. at 360, that in order to find that an act or failure to act was willful, the jury must find a voluntary, intentional violation of a known legal duty.

court's instruction or supports petitioner's contention that the term "willful" must be defined by the trial judge as requiring an "evil motive." In *United States* v. *Bishop*, *supra*, 412 U.S. at 360, this Court held that the word "willful" in the criminal tax statutes "connotes a voluntary, intentional violation of a known legal duty." The above-quoted instruction of the trial court is in complete accord with the *Bishop* definition of "willful."

Similarly, *United States* v. *Murdock*, *supra*, does not conflict with the decision below. There, the defendant was charged with willful failure to supply information requested by the Internal Revenue Service. The Court held that the criminal sanction for such conduct did not apply to one whose refusal to give requested information was based upon his *bona fide*, though mistaken, understanding of his constitutional protection against self-incrimination. Since the scope of the privilege was uncertain at the time of the defendant's refusal to supply the summoned information, the Court held that the defendant was entitled to an instruction that the jury should consider whether his conduct was based upon his good faith belief that the privilege was applicable. While the Court in *Murdock* formulated the requirement of willfulness as "bad faith or evil intent"

(290 U.S. at 398), nothing in that case requires that the trial court employ those precise words in its instructions to the jury. Indeed, as the Court pointed out in *Bishop* (412 U.S. at 360-361), the *Murdock* definition of willfulness is synonymous with the "voluntary, intentional violation of a known legal duty" standard applied by the trial court in this case. Both formulations are designed to "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers" (412 U.S. at 361). See also *Cooley* v. *United States*, 501 F.2d 1249, 1253 n. 4 (C.A. 9), certiorari denied, 419 U.S. 1123; *United States* v. *Hawk*, 497 F.2d 365 (C.A. 9), certiorari denied, 419 U.S. 838; *United States* v. *Matosky*, 421 F.2d 410, 412 (C.A. 7), certiorari denied, 398 U.S. 904; *Lumetta* v. *United States*, 362 F.2d 644 (C.A. 8).

Finally, there is no conflict with *United States* v. *Pohlman*, 510 F.2d 414 (C.A. 8). There, the taxpayer's defense to a failure to file charge was that she was so busy with business and personal problems that she did not realize that she had earned sufficient income to require filing a tax return. The portion of the trial court's instruction which the court held to be erroneous stated (Pet. App. D 28):

> The word "willfully" used in connection with this offense means deliberately, and intentionally, *and without justifiable excuse*, *or* with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed * * * . [Emphasis added.]

The Eighth Circuit concluded that the phrase "and without justifiable excuse" may have led the jury to convict the taxpayer even if it believed that her defense negated the requisite specific intent because preoccupation with other affairs is not a justifiable excuse for failure to file a tax return. However, the phrase "without justifiable excuse" was not used by the trial court in this case so the rationale of *Pohlman* is inapplicable. Moreover, *Pohlman* is not a final decision since the Eighth Circuit has granted rehearing *en banc* in that case.

2. Petitioner further argues (Pet. 10-11) that his cross-examination of two Treasury agents was unduly restricted by excluding testimony concerning parts of conversations between petitioner and the two agents even though the trial court admitted testimony concerning other parts of the conversations during direct examination of the agents. But, as the court below pointed out (Pet. App. B 17), the conversations testified to by the agents on direct examination were admissible as admissions of a party opponent, while the self-serving statements which petitioner sought to bring out were generally inadmissible as hearsay. See *United States* v. *Seyfried*, 435 F.2d 696 (C.A. 7), certiorari denied, 402 U.S. 912. The court, therefore, correctly held that the doctrine of verbal completeness did not entitle petitioner to bring out the whole of the conversations, since irrelevant testimony concerning a conversation need not be admitted simply because testimony describing another part of the conversation is admitted. VII Wigmore, *Evidence*, §2113, p. 524 (3d ed. 1940).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

DOJ-1975-07